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RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

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8  
9 IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
(OAKLAND DIVISION)

10  
11 CALIFORNIA SERVICE EMPLOYEES  
HEALTH & WELFARE TRUST FUND,  
12 MIKE GARCIA, Trustee, CHARLES  
GILCHRIST, Trustee, RAYMOND C. NANN,  
13 Trustee, LARRY T. SMITH, Trustee,

14 Plaintiffs,

15 vs.

16 A & B MAINTENANCE, INC., a California  
corporation,

17 Defendant.  
18

Case No.

07-04945

COMPLAINT

21 PARTIES

22 1. Plaintiff California Service Employees Health & Welfare Trust Fund (“the Trust”)  
23 is a multiemployer joint labor-management welfare fund established pursuant to Section 302(c) of  
24 the Labor Management Relations Act (“LMRA”) (29 U.S.C. § 186(c)). The Trust maintains its  
25 principal office and is administered in Alameda, California. Its purpose is to provide health and  
26 welfare and related benefits to the eligible employees of employers who contribute to the Trust  
27 pursuant to various consecutive collective bargaining agreements (“Bargaining Agreement”)  
28 between local unions affiliated with the Service Employees International Union (“SEIU”).

1 Plaintiffs Mike Garcia, Charles Gilchrist, Raymond C. Nann and Larry T. Smith are Trustees of  
2 the Trust.

3 2. Defendant A & B Maintenance, Inc., a California corporation, ("Defendant") is a  
4 janitorial and maintenance services business registered to do business in the State of California  
5 with its last known principal place of business located in the city of Gardena, California.  
6 Defendant is principally engaged in the business of providing building cleaning and maintenance  
7 services to markets and grocery stores in the retail food industry. The business of Defendant  
8 affects commerce within the meaning of Section 301 of the LMRA (29 U.S.C. § 185).

9 **JURISDICTION**

10 3. Jurisdiction exists in this Court over the claims asserted by the Plaintiffs by virtue  
11 of ERISA Section 502, 29 U.S.C. § 1132, in that the Plaintiffs seek to enforce the provisions of  
12 ERISA and the terms of their plans, seek to enjoin the acts and practices that violate ERISA, seek  
13 equitable relief to redress such violations, and seek all other appropriate relief under ERISA.

14 4. Jurisdiction exists in this Court over all the claims by virtue of Section 301 of the  
15 Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, in that the Plaintiffs seek to  
16 enforce the terms and conditions of the Bargaining Agreement between the employer and a labor  
17 organization.

18 **VENUE**

19 5. Venue exists in this Court with respect to the claims under ERISA Section 502, 29  
20 U.S.C. § 1132, because the Trust conducts its business and may be found in this district, and the  
21 breaches under ERISA occurred in this district.

22 **INTRADISTRICT ASSIGNMENT**

23 6. The basis for assignment of this action to this Court's Oakland Division is that all  
24 of the events and omissions giving rise to Plaintiffs' claims occurred in the County of Alameda,  
25 where the Trust is administered, and where Defendant therefore failed to fulfill its statutory and  
26 contractual obligations to the Trust.

27 ///

28 ///

**APPLICABLE LAW**

7. Section 515 of ERISA [29 U.S.C. § 1145] requires employers who are obligated to make contributions to a multiemployer plan do so in accordance with the terms of the Bargaining Agreement.

8. ERISA Section 502(g)(2) [29 U.S.C. § 1132(g)(2)] provides as follows:

In any action under this title by a fiduciary for or on behalf of a plan to enforce Section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan:

- (A) the unpaid contributions,
- (B) interest on the unpaid contributions,
- (C) an amount equal to the greater of:
  - (i) interest on the unpaid contributions, or
  - (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
- (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
- (E) such other legal or equitable relief as the court deems appropriate.

9. ERISA Section 502(a)(3) [29 U.S.C. § 1132(a)(3)] authorizes a civil action by the Trustees as ERISA fiduciaries:

- (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or
- (B) to obtain other appropriate equitable relief
  - (i) to redress such violations, or
  - (ii) to enforce any provision of this title or the terms of the plan.

10. ERISA §209 [29 USC §1059], Recordkeeping and reporting requirements, provides as follows:

1 (a)(1) Except as provided by paragraph (2) every employer shall, in accordance  
2 with regulations prescribed by the Secretary, maintain records with respect to each  
3 of his employees sufficient to determine the benefits due or which may become due  
4 to such employees. The plan administrator shall make a report, in such manner and  
5 at such time as may be provided in regulations prescribed by the Secretary, to each  
6 employee who is a participant under the plan and who —

7 (A) requests such report, in such manner and at such time as may be  
8 provided in such regulations,

9 (B) terminates his service with the employer, or

10 (C) has a 1-year break in service (as defined in section 203(b)(3)(A) [29  
11 USC §1053(b)(3)(A)]).

12 The employer shall furnish to the plan administrator the information necessary for  
13 the administrator to make the reports required by the preceding sentence. Not more  
14 than one report shall be required under subparagraph (A) in any 12-month period.  
15 Not more than one report shall be required under subparagraph (C) with respect to  
16 consecutive 1-year breaks in service. The report required under this paragraph shall  
17 be sufficient to inform the employee of his accrued benefits under the plan and the  
18 percentage of such benefits which are nonforfeitable under the plan.

19 (2) If more than one employer adopts a plan, each such employer shall, in  
20 accordance with regulations prescribed by the Secretary, furnish to the plan  
21 administrator the information necessary for the administrator to maintain the  
22 records and make the reports required by paragraph (1). Such administrator shall  
23 maintain the records and, to the extent provided under regulations prescribed by the  
24 Secretary, make the reports, required by paragraph (1).

25 11. The Trustees have a right under ERISA to conduct an audit of a contributing  
26 employer's relevant books and records under the terms of the Trust Agreement. *Central States,*  
27 *Southeast and Southwest Areas Pension Fund v Central Transport, Inc.*, 472 US 559 (1985), *reh'g*  
28 *denied* 473 U.S. 926.

**FACTS**

12. At all times relevant to this action, Defendant was a party to and bound by Bargaining Agreement covering Defendant's employees. The Bargaining Agreement requires that Defendant contribute to the Trust at specified rates per month for each of its employees covered by the Bargaining Agreement.

13. As an employer participating in the Trust, Defendant is bound by the Agreement and Declaration of Trust ("Trust Agreement") establishing the Trust, the terms of the Trust's Plan Documents, and the rules, regulations and policies adopted by the Trustees under the authority of the Trust Agreement.

14. Defendant's contractual duty under the Bargaining Agreement requires it to timely make payment in full of the required contributions to the Trust according to its terms or the terms of the Bargaining Agreement, under ERISA Section 515, 29 U.S.C. § 1145.

15. At all times relevant to this action, Article IV, Sections 4 and 5 of the Trust Agreement and the "Revised Rule Concerning Assessment of Liquidated Damages in the Event of Delinquent Contributions," effective starting with November 2004 hours worked, contributing employers were required to submit monthly remittance reports of all covered hours of service by persons covered by the Bargaining Agreement along with contributions owed, to the Trust's principal place of business on or before the 10th day of each month following the month in which the covered work was performed.

16. At all times relevant to this action, under Article IV, Sections 5 and 6(a) of the Trust Agreement and the "Revised Rule Concerning Assessment of Liquidated Damages in the Event of Delinquent Contributions," contributions received by the Trust after the 20th day of the month following the month in which the covered work was performed were deemed delinquent.

17. At all times relevant to this action, in accordance with ERISA Section 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B), Article IV, Section 6(c) of the Trust Agreement provided that prior to the filing of a lawsuit, delinquent contributions shall accrue interest at the rate of ten percent (10%) simple interest per annum until paid or until a lawsuit is filed.

1 18. At all times relevant to this action, in accordance with ERISA Section  
2 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B), Article IV, Section 6(c) of the Trust Agreement  
3 provided that after the filing of a lawsuit, unpaid contributions shall accrue interest at the  
4 underpayment rate of the Internal Revenue Service Code Section 6621 from the date due until  
5 paid.

6 19. At all times relevant to this action, effective starting with November 2004 hours  
7 worked, in accordance with ERISA Section 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C), Article IV,  
8 Section 6(b) of the Trust Agreement and the "Revised Rule Concerning Assessment of Liquidated  
9 Damages in the Event of Delinquent Contributions" provided that if the payment of contributions  
10 and the contributions report form were not postmarked by the 20th of the month but are received  
11 by the 25th of the month, prior to the filing of a lawsuit, the employer shall be obligated to pay  
12 liquidated damages in the amount of \$200, and if the payment of contributions and the  
13 contributions report form were not received by the 25th day of the month, the employer shall be  
14 obligated to pay an amount equal to the greater of: (a) 5% of the delinquent contributions or (b)  
15 \$200.

16 20. At all times relevant to this action, effective starting with November 2004 hours  
17 worked, in accordance with ERISA Section 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C), Article IV,  
18 Section 6(b) of the Trust Agreement and the "Revised Rule Concerning Assessment of Liquidated  
19 Damages in the Event of Delinquent Contributions" provided that after the filing of a lawsuit, the  
20 employer shall be obligated to pay an amount equal to the greater of: (1) 20% of the amount of the  
21 delinquent contributions, or (2) interest on the delinquent contributions as calculated under Article  
22 IV, Section 6(c) of the Trust Agreement (*see supra* paragraphs 17 and 18).

23 21. At all times relevant to this action, in accordance with ERISA Section 502(g)(2)(D)  
24 and (E), 29 U.S.C. § 1132(g)(2)(D) and (E), Article IV, Section 8 of the Trust Agreement  
25 provided that in the event of a lawsuit, in addition to the delinquent contributions, interest and  
26 liquidated damages due to the Trust, the delinquent contributing employer shall pay to the Trust  
27 all attorneys' fees incurred in the litigation and any audit fees incurred in the audit and in  
28 connection with the litigation.



1           18.     At all times relevant to this action, in accordance with ERISA Section  
2 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B), Article IV, Section 6(c) of the Trust Agreement  
3 provided that after the filing of a lawsuit, unpaid contributions shall accrue interest at the  
4 underpayment rate of the Internal Revenue Service Code Section 6621 from the date due until  
5 paid.

6           19.     At all times relevant to this action, effective starting with November 2004 hours  
7 worked, in accordance with ERISA Section 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C), Article IV,  
8 Section 6(b) of the Trust Agreement and the "Revised Rule Concerning Assessment of Liquidated  
9 Damages in the Event of Delinquent Contributions" provided that if the payment of contributions  
10 and the contributions report form were not postmarked by the 20th of the month but are received  
11 by the 25th of the month, prior to the filing of a lawsuit, the employer shall be obligated to pay  
12 liquidated damages in the amount of \$200, and if the payment of contributions and the  
13 contributions report form were not received by the 25th day of the month, the employer shall be  
14 obligated to pay an amount equal to the greater of: (a) 5% of the delinquent contributions or (b)  
15 \$200

16           20.     At all times relevant to this action, effective starting with November 2004 hours  
17 worked, in accordance with ERISA Section 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C), Article IV,  
18 Section 6(b) of the Trust Agreement and the "Revised Rule Concerning Assessment of Liquidated  
19 Damages in the Event of Delinquent Contributions" provided that after the filing of a lawsuit, the  
20 employer shall be obligated to pay an amount equal to the greater of: (1) 20% of the amount of the  
21 delinquent contributions, or (2) interest on the delinquent contributions as calculated under Article  
22 IV, Section 6(c) of the Trust Agreement (*see supra* paragraphs 17 and 18).

23           21.     At all times relevant to this action, in accordance with ERISA Section 502(g)(2)(D)  
24 and (E), 29 U.S.C. § 1132(g)(2)(D) and (E), Article IV, Section 8 of the Trust Agreement  
25 provided that in the event of a lawsuit, in addition to the delinquent contributions, interest and  
26 liquidated damages due to the Trust, the delinquent contributing employer shall pay to the Trust  
27 all attorneys' fees incurred in the litigation and any audit fees incurred in the audit and in  
28 connection with the litigation.

22. At all times relevant to this action, Article IV, Section 7, of the Trust Agreement authorized the Trust to examine and copy such records of Defendant as may be necessary to determine whether Defendant has made full and prompt payment of all sums due to the Trust.

23. During the period of October 2005 to the present Defendant failed to pay certain contributions due for hours worked by its covered employees that remain due and owing the Trust. Defendant is therefore in breach of the Bargaining Agreement between the Trust and Defendant in effect during the above period and thereby breached the terms of the Trust Agreement to which Defendant is bound, and is, therefore, liable to the Trust for payment of delinquent contributions, liquidated damages, interest, reasonable attorney's fees and costs.

24. During the period of July 2006 through April 2007 Defendant failed to timely pay the Trust for contributions due for hours worked by its covered employees. Defendant, therefore, breached of the Bargaining Agreement between the Trust and Defendant in effect during the above period and thereby breached the terms of the Trust Agreement to which Defendant is bound, and is, therefore, liable to the Trust for payment of liquidated damages and interest accrued on the late paid contributions, calculated from the date the contributions became due until the date they were received by the Trust office, reasonable attorney's fees and costs.

25. During the period April 28, 2006 to the present, numerous itemized demands have been made upon Defendant for payment of the above-described delinquent contributions, liquidated damages and interest.

26. Despite the numerous demands, Defendant has refused and continues to refuse to pay the amounts owed.

27. Defendant claims that during at least some of the periods at issue in this action it did not employ any employees who performed work covered by the Bargaining Agreement.

**FIRST CAUSE OF ACTION**  
**An Order Requiring Defendant To Permit An Examination  
Of Its Business Records Maintained Under ERISA § 209**

28. Plaintiffs re-allege and incorporate by reference paragraphs 1 – 27 above as though they were fully set forth herein.



29. Defendant claims that during at least some of the periods at issue in this action it did not employ any employee who performed work covered by the Bargaining Agreement.

30. Defendant as a party to the Bargaining Agreement agreed to be bound by the terms thereof and by the Terms of the Trust Agreement and Plan documents.

31. Under ERISA §209 [29 USC §1059] Defendant is obligated to maintain adequate records with respect to each of its employees sufficient to determine the benefits due or which may become due to such employees.

32. As an employer participating in the Trust, Defendant is bound by the Agreement and Declaration of Trust ("Trust Agreement") establishing the Trust, the terms of the Trust's Plan Documents, and the rules, regulations and policies adopted by the Trustees under the authority of the Trust Agreement.

33. At all times relevant to this action, Article IV, Section 7, of the Trust Agreement authorizes the Trustees to conduct an examination of Defendant's business records as may be necessary to determine whether Defendant has made full and prompt payment of all sums due to the Trust and the Trustees hereby assert such right to conduct an audit. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 US 559 (1985), *reh'g denied* 473 U.S. 926.

## SECOND CAUSE OF ACTION

### SECOND CAUSE OF ACTION

#### **Payment of Delinquent Contributions Under ERISA Sections 502(g)(2) and 515**

34. Plaintiffs re-allege and incorporate by reference paragraphs 1 – 33 above as though they were fully set forth herein.

35. Defendant as a party to the Bargaining Agreement agreed to be bound by the terms thereof and by the Terms of the Trust Agreement and Plan documents.

36. Defendant violated ERISA Section 515, 29 U.S.C. § 1145, by failing to timely make contributions to the Trust in accordance with its obligation to do so under the terms of the Bargaining Agreement entered into between the Trust and Defendant and the terms of the Trust Agreement.

37. Under ERISA Section 502(g)(2)(A) – (E), 29 U.S.C. § 1132(g)(2) (A) – (E), Defendant is liable for payment of delinquent contributions due and owing the Trust pursuant to the employer contribution reports submitted by Defendant to the Trust and to be determined by the results of the audit demanded in the First Cause of Action set forth above, as well as for interest, liquidated damages, attorneys' fees, costs and accountants' fees.

**THIRD CAUSE OF ACTION**  
**Injunction Under ERISA Section 502(a)(3)**

38. Plaintiffs re-allege and incorporate by reference paragraphs 1 – 37 above as though they were fully set forth herein.

39. Plaintiffs are without adequate remedy at law and the Bargained Plans will suffer continuing and irreparable injury, loss and damage unless Defendant is ordered specifically to perform all obligations required on Defendant's part to be performed under ERISA, 29 U.S.C. §§ 1101-1381, the LMRA, 29 U.S.C. §§ 141-197, the Bargaining Agreement, and the governing documents of the Plans referred to therein; and is restrained from continuing to refuse to perform as required thereunder; and to pay all contributions, interest, liquidated damages, costs, attorneys' fees and accountants' fees determined to be due the Trust.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray as follows:

1. For an order requiring Defendant to promptly permit an examination of its business records by an accounting firm engaged by Plaintiffs to determine all contributions due to the Trust;

2. For judgment against Defendant, in favor of the Bargained Plans, in an amount equal to:

(a) Under ERISA Section 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A), and the Bargaining Agreement, an award of unpaid contributions due the Trust, according to proof, for hours worked by its covered employees during the period October 2005 to the present;

(b) Under ERISA Section 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B), an award of , interest on unpaid contributions during the period October 2005 to the present at the rates set

1 in accordance with the Bargaining Agreement, the governing documents of the Bargained Plans,  
2 and with respect to the ERISA Plaintiffs.

3 (c) Under ERISA Section 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C), an award  
4 of liquidated damages on unpaid contributions during the period October 2005 to the present in an  
5 amount equal to the greater of:

6 (i) Interest on the unpaid contributions, or

7 (ii) Liquidated damages provided for under the Bargaining Agreement  
8 on the aforementioned unpaid and late paid contributions in  
9 accordance with the Bargaining Agreement, the governing  
10 documents of the Bargained Plans and with respect to the ERISA  
11 Plaintiffs.

12 (d) Interest on contributions paid late to the Trust during the period July 2006  
13 through April 2007 at the rates set in accordance with the Bargaining Agreement and the  
14 governing documents of the Bargained Plans.

15 (e) Liquidated damages on contributions paid late to the Trust during the period  
16 July 2006 through April 2007 at the rates set in accordance with the Bargaining Agreement and  
17 the governing documents of the Bargained Plans.

18 (f) Plaintiffs' reasonable attorneys' fees and costs of this action in accordance  
19 with ERISA Section 502(g)(2)(D), 29 U.S.C. § 1132(g)(2)(D), and in accordance with LMRA  
20 Section 301, 29 U.S.C. § 185, and; reasonable attorney's fees and costs in accordance with Article  
21 IV, Section 8 of the Trust Agreement.

22 (g) Plaintiffs' reasonable audit fees under ERISA Section 502(g)(2)(E), 29  
23 U.S.C. § 1132(g)(2)(E), and under Article IV, Section 8 of the Trust Agreement.

24 3. For a preliminary and permanent injunction under ERISA Section 502(a)(3), 29  
25 U.S.C. § 1132(a)(3), and under ERISA Section 502(g)(2)(E), 29 U.S.C. § 1132(g)(2)(E), against  
26 Defendant from: (1) any further violation of the terms of the Bargaining Agreement and the  
27 governing documents referred to therein, (2) disposing of any assets until said terms have been  
28

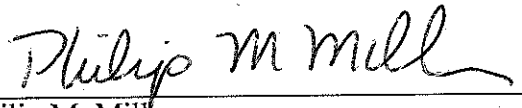
1 complied with and (3) continuation of operation of Defendant's business until said terms have  
2 been complied with.

3 4. For such other and further relief as the Court may deem just and proper.

4 Date: September 24, 2007

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Philip M. Miller  
Kristen McCulloch

By:

  
Philip M. Miller,  
Attorneys for Plaintiff